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IN THE

Supreme Court of the United States

October Term, 1961

No. [redacted] 71

JAMES RICHARD PETERSON, YVONNE JOAN EDDY, HELEN ANGELA EVANS, DAVID RALPH STRAWDER, HAROLD JAMES FOWLER, FRANK G. SMITH, ROBERT CROCKETT, JAMES CARTER, DORIS DELORES WRIGHT and ROSE MARIE COLLINS,

Petitioners,

—v.—

CITY OF GREENVILLE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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IN THE

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Petitioners,

—v.—

CITY OF GREENVILLE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina, entered in the above entitled case on November 10, 1961, rehearing of which was denied November 30, 1961.

Citation to Opinions Below

The opinion of the Supreme Court of South Carolina, which opinion is the final judgment of that Court, is reported at 122 S. E. 2d 826 (1961) and is set forth in the appendix hereto, *infra* pp. 5a-10a. The opinion of the Greenville County Court is unreported and is set forth in the appendix hereto, *infra* pp. 1a-4a.

Jurisdiction

The Judgment of the Supreme Court of South Carolina was entered November 10, 1961, *infra* pp. 5a-10a. Petition for rehearing was denied by the Supreme Court of South Carolina on November 30, 1961, *infra* p. 11a.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code Section 1257(3), petitioners having asserted below, and asserting here, deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Questions Presented

Whether Negro petitioners were denied due process of law and equal protection of the laws as secured by the Fourteenth Amendment:

1. When arrested and convicted of trespass for refusing to leave a department store lunch counter where the store's policy of excluding Negroes was made pursuant to local custom and a segregation Ordinance of the City of Greenville.

2. Whether petitioner sit-in demonstrators were denied freedom of expression secured by the Fourteenth Amendment when convicted of trespass upon refusal to move from a white-only lunch counter when (a) the manager did not request arrest or prosecution and was apparently willing to endure the controversy without recourse to the criminal process and exclusion from the counter was required by a City Ordinance commanding segregation in eating facilities, and (b) the convictions rest on a statute which fails to re-

quire proof that petitioners were requested to leave by a person who had established authority to issue such request at the time given.

Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case involves Section 16-388, Code of Laws of South Carolina, 1952, as amended 1960:

> Any person:
>
> (1) Who without legal cause or good excuse enters into the dwelling house, place of business or on the premises of another person, after having been warned within six months preceding, not to do so or
>
> (2) who, having entered into the dwelling house, place of business or on the premises of another person without having been warned within six months not to do so, and fails and refuses, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, or his agent or representative,
>
> Shall, on conviction, be fined not more than one hundred dollars, or be imprisoned for not more than thirty days.

3. This case involves Section 31-8, Code of Greenville, 1953, as amended by 1958 Cumulative Supplement (R. 56, 57):

> It shall be unlawful for any person owning, managing or controlling any hotel, restaurant, cafe, eating

house, boarding house or similar establishment to furnish meals to white persons and colored persons in the same room, or at the same table, or at the same counter; provided, however, that meals may be served to white persons and colored persons in the same room where separate facilities are furnished. Separate facilities shall be interpreted to mean:

a) Separate eating utensils and separate dishes for the serving of food, all of which shall be distinctly marked by some appropriate color scheme or otherwise;

b) Separate tables, counters or booths;

c) A distance of at least thirty-five feet shall be maintained between the area where white and colored persons are served;

d) The area referred to in subsection (c) above shall not be vacant but shall be occupied by the usual display counters and merchandise found in a business concern of a similar nature;

e) A separate facility shall be maintained and used for the cleaning of eating utensils and dishes furnished the two races.

Statement

Petitioners, ten Negro students, were arrested for staging a sit-in demonstration at the lunch counter of the S. H. Kress and Company department store on August 9, 1960 (R. 3), in Greenville, South Carolina, a City which by Ordinance requires segregation in eating facilities (R. 56, 57) and were convicted of trespass in violation of Section 16-388, Code of Laws of South Carolina, 1952, as amended

1960 and sentenced to pay a fine of one hundred dollars ($100.00) or serve thirty (30) days in jail (R. 54).

After informing the S. H. Kress and Company department store in Greenville of their desire to be served at the store's lunch counter and learning that the manager would not press charges against them if they sought service (R. 43), petitioners, at about eleven A.M., seated themselves at the lunch counter and requested service (R. 40, 41). White persons were seated at the counter at the time (R. 19, 20, 41). Petitioners were told, "I'm sorry, we don't serve Negroes" (R. 41).

Also at about eleven A.M., Captain Bramlette of the Greenville Police Department received a call to go to the Kress store (R. 5). He did not know where the call came from (R. 5). He was told that there were colored young boys and girls at the lunch counter (R. 9) and he knew that the City of Greenville had an Ordinance prohibiting colored and white persons being seated at the same lunch counter (R. 9). He arrived at the store with several city policemen and found two agents of the South Carolina Law Enforcement Department already present at the lunch counter (R. 6). He noticed the ten petitioners seated at the lunch counter (R. 6) which could accommodate almost fifty-nine persons (R. 27). The petitioners were orderly and inoffensive in demeanor (R. 12, 25, 26).

In the presence of the police officers the counter lights were turned out (R. 19) and G. W. West, manager of the store requested " . . . everybody to leave, that the lunch counter was closed" (R. 19). At the trial, petitioners' counsel was denied permission to ascertain whether this request followed arrangement or agreement with the Police (R. 23, 24, 26). Neither Mr. West, the manager, nor the police officers, testified that West identified himself or his authority to the petitioners either before or after making

this announcement.[1] When petitioners made no attempt to leave the lunch counter, Captain Bramlette placed them under arrest (R. 20).[2]

Store manager West at no time requested that defendants be arrested (R. 26):

> Q. And you at no time requested Captain Bramlette and the other officers to place these defendants under arrest, did you? A. No, I did not.
>
> Q. That was a matter, I believe, entirely up to the law enforcement officers? A. Yes, sir.

White persons were seated at the counter when the announcement to close was made (R. 20, 33, 34) but no white person was arrested (R. 34). As soon as petitioners were removed by the police, the lunch counter was reopened (R. 24, 34).

West testified that one of the store's employees called the police (R. 23) but when petitioners' counsel attempted to bring out any arrangements or agreements between the store and the police, the Court denied permission to proceed (R. 23-24, 26). But West testified that he closed the lunch counter because of the Greenville City Ordinance requiring racial segregation in eating facilities and local custom:

---

[1] There is evidence that one of the petitioners, Doris Wright, had spoken with the store manager prior to the demonstration (R. 43), but the record is without evidence that any of the other petitioners were informed or had reason to know that the person who requested them to leave had authority to do so. Doris Wright, moreover, testified that the request to leave was made by the Police and not by manager West who "... was coming from the back at the time ... the arrests were being made" (R. 42, 47).

[2] Four other Negro demonstrators were arrested but their cases were disposed of by the juvenile authorities (R. 6).

Q. Mr. West, why did you order your lunch counter closed? A. It's contrary to local custom and it's also the Ordinance that has been discussed (R. 25).

On cross examination, Captain Bramlette, the arresting officer, evidenced confusion as to whether defendants were arrested because they violated Greenville's Ordinance requiring segregation in eating facilities or the State of South Carolina's trespass statute (R. 16, 17):

Q. Did the manager of Kress', did he ask you to place these defendants under arrest, Captain Bramlette? A. He did not.

Q. He did not? A. No.

Q. Then why did you place them under arrest? A. Because we have an Ordinance against it.

Q. An Ordinance? A. That's right.

Q. But you just now testified that you did not have the Ordinance in mind when you went over there? A. State law in mind when I went up there.

Q. And that isn't the Ordinance of the City of Greenville, is it? A. This supersedes the order for the City of Greenville.

Q. In other words, you believe you referred to an ordinance, but I believe you had the State statute in mind? A. You asked me have I, did I have knowledge of the City Ordinance in mind when I went up there and I answered I did not have it particularly in my mind, I said I had the State Ordinance in my mind.

Q. I see and so far this City Ordinance which requires segregation of the races in restaurants, you at no time had it in mind, as you went about answering the call to Kress' and placing these people under arrest? A. In my opinion the state law was passed recently supersedes our City Ordinance.

This "State Law" is the trespass statute petitioners were charged with violating. Previously, Captain Bramlette had testified that he thought the State's trespass statute prohibited "sit-ins." He later admitted that the statute did not mention "sit-ins" (R. 14).

Kress and Company is a large nationwide chain (R. 21) which operates junior department stores (R. 21). The Greenville branch has fifteen to twenty departments, sells over 10,000 items and is open to the general public (R. 21, 22). Negroes and whites are invited to purchase and are served alike with the exception that Negroes are not served at the lunch counter which is reserved for whites (R. 22). Kress's national policy is "to follow local customs" with regard to serving Negroes and whites at its lunch counters (R. 22, 23).

Petitioners were tried and convicted in the Recorder's Court of Greenville before the City Recorder, sitting without a jury, and sentenced to pay a fine of one hundred dollars ($100.00) or serve thirty (30) days in the City jail (R. 2, 54).

Petitioners appealed the judgment of Recorder's Court to the Greenville County Court, which Court dismissed the appeal on March 17, 1961 (R. 57-60).

The Supreme Court of South Carolina entered its judgment, affirming the judgment and sentences below on November 10, 1961, *infra* pp. 5a-10a, and denied rehearing on November 30, 1961, *infra* p. 11a.

How the Federal Questions Were Raised

At the commencement of the trial in the Recorder's Court of the City of Greenville, petitioners moved to quash the informations and dismiss the warrants on the ground that the charge was too uncertain and indefinite to apprise petitioners of the charge against them, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States (R. 2, 3). The motion was denied by the Court (R. 3).

At the close of the prosecution's case, petitioners moved to dismiss the warrants against them:

> "The evidence presented on the charge shows conclusively that by arresting the defendants the officers were aiding and assisting the owners and managers of Kress' Five and Ten Cent Store, in maintaining their policies of segregating or excluding service to Negroes at its lunch counter . . . in violation of defendants' rights to due process of law, and equal protection of the laws, under the 14th Amendment to the United States Constitution" (R. 28, 29);
>
> "that the warrant which charges them with trespass after warning, the designation of the act being set forth as invalid, in that the evidence establishes merely that defendants were peacefully upon the premises of S. H. Kress & Company, which establishment is performing an economic function invested with the public interest as customers, visitors, business guests or invitees and there is no basis for the charge recited by the warrants other than an effort to exclude these defendants from the lunch counters of Kress' Five and Ten Cent Store, because of their race and color . . . thereby depriving them of liberty without due process

of law and equal protection of the laws secured to them by the 14th Amendment to the United States Constitution" (R. 29, 30);

"The designation of the act being set forth in the warrant under which all these defendants, who are Negroes, were arrested and charged is on the evidence unconstitutional as applied to the defendants, in that it makes it a crime to be on property open to the public after being asked to leave because of race and color in violation of the defendants' rights under the due process and equal protection clauses of the 14th Amendment to the United States Constitution" (R. 30).

These motions were denied by the Court (R. 29, 30).

Petitioners further moved for a dismissal on the ground that the City had not established a *prima facie* case (R. 30). This motion was denied (R. 30).

At the close of the trial, petitioners renewed all motions for dismissal made at the conclusion of the City's case (R. 52). These motions were again denied (R. 52). Further, petitioners moved for dismissal of the cases on the ground that:

"... the Negro defendants, were arrested and charged under a statute which is itself unconstitutional on its face, by making it a crime to be on public property after being asked to leave by an individual, at such individual's whim. In that, such statute does not require that the person making the demand to leave, present documents or other evidence of possessing a right sufficient to apprise the defendants of the validity of the demand to leave. All of which renders the statute so vague and uncertain, as applied to the defendants, as to violate their rights under the due process clause

of the 14th Amendment to the United States Constitution . . . "

This motion was denied by the Court (R. 53).

At the close of petitioners' trial, but before judgment, petitioners' counsel moved to place Greenville's segregation in eating facilities Ordinance in evidence for consideration in regard to the judgment (R. 53). The Court denied this motion (R. 54) but the Ordinance was placed in record on appeal (R. 56).

Subsequent to judgment, petitioners renewed all motions made prior thereto by moving for arrest of judgment or, in the alternative, a new trial (R. 54). The motion was not granted (R. 54, 55).

After considering petitioners' exceptions (R. 60), the Greenville County Court, on appeal held:

". . . the appeal should be dismissed because the prosecution was conducted under a valid constitutional statute and in addition the appeal should be dismissed upon the ground that S. H. Kress and Company has a right to control its own business. We think this position is fully sustained under the recent case of Williams v. Johnson, Res. 344, 268 Fed. (2d) 845 and the North Carolina case of State v. Nelson decided January 20, 1961 and reported in 118 S. E. (2d) at page 47" (R. 60).

In appealing to the Supreme Court of South Carolina, petitioners set forth the following exceptions to the judgment below (R. 61-63):

"1. The Court erred in refusing to hold that the warrant is vague, indefinite and uncertain and does not plainly and substantially set forth the offense charged, thus failing to provide appellants with suffi-

cient information to meet the charges against them as is required by the laws of the State of South Carolina, in violation of appellants' rights to due process of law, secured by the Fourteenth Amendment to the United States Constitution.

2. The Court erred in refusing to hold that the State failed to establish the corpus delicti.

3. The Court erred in refusing to hold that the State failed to prove a *prima facie* case.

4. The Court erred in refusing to hold that the evidence of the State shows conclusively that by arresting appellants the officers were aiding and assisting the owners and managers of S. H. Kress and Company in maintaining their policies of segregating or excluding service to Negroes at their lunch counters on the ground of race or color, in violation of appellants' right to due process of law and equal protection of the laws, secured by the Fourteenth Amendment of the United States Constitution.

5. The Court erred in refusing to hold that the evidence establishes merely that the appellants were peacefully upon the premises of S. H. Kress and Company, an establishment performing an economic function invested with the public interest as customers, visitors, business guests or invitees, and that there is no basis for the charge recited by the warrants other than an effort to exclude appellants from the lunch counter of said business establishment because of their race and color, thereby depriving appellants of liberty without due process of law and equal protection of the laws, secured by the Fourteenth Amendment to the United States Constitution.

6. The Court erred in refusing to hold that the statute appellants are alleged to have violated, to wit, Act No. 743 of the Acts and Joint Resolutions of the General Assembly of South Carolina for 1960 (R. 896, H. 2135), is unconstitutional on its face by making it a crime to be on public property after being asked to leave by an individual at such individual's whim and does not require that the person making the demand to leave present documents or other evidence of possessory right sufficient to apprise appellants of the validity of the demand to leave, all of which renders the statute so vague and uncertain as applied to appellants as to violate their rights under the due process clause of the Fourteenth Amendment to the United States Constitution.

7. The Court erred in refusing to permit defendants' counsel to elicit relevant testimony concerning cooperation of Store Managers and Police in the City of Greenville, South Carolina in pursuing the store managers' policies, customs and practices of segregating or excluding Negroes from their lunch counters."

In disposing of petitioners' constitutional objections, the Supreme Court of South Carolina held that the charge in the warrant was "definite, clear and unambiguous" *infra* p. 7a; that "the act makes no reference to race or color and is clearly for the purposes of protecting the rights of the owners or those in control of private property. Irrespective of the reason for closing the counter, the evidence is conclusive that defendants were arrested because they chose to remain upon the premises after being requested to leave by the manager . . . and their constitutional rights were not violated when they were arrested for trespass," *infra* pp. 8a, 9a.

The Court disposed of Greenville's Ordinance requiring segregation in eating facilities as follows:

> "Upon cross-examination of Capt. G. O. Bramlette of the Greenville City Police Department, it was brought out that the City of Greenville has an ordinance making it unlawful for any person owning, managing, or controlling any hotel, restaurant, cafe, etc., to furnish meals to white persons and colored persons except under certain conditions; and Defendants contend that they were prosecuted under this ordinance; however, the warrant does not so charge and there is nothing in the record to substantiate this contention. The ordinance was made a part of the record upon request of defendants' counsel but defendants were not charged with having violated any of its provisions. The question of the validity of this ordinance was not before the trial Court and therefore not before this Court on appeal."

Reasons for Granting the Writ

The Court below decided this case in conflict with principles declared by this Court as is further set forth below:

I.

Petitioners were denied due process of law and equal protection of the laws by conviction of trespass in refusing to leave white lunch counter where their exclusion was required by City Ordinance.

Although formally charged with violation of South Carolina's trespass statute, petitioners were actually convicted of having violated the segregation policy of the City of Greenville. This policy is expressed in Section 31-8, Code

of Greenville, 1953, as amended 1958 Cumulative Supplement, see *supra* p. 3, making it unlawful ". . . to furnish meals to white persons and colored persons in the same room, or the same table, or at the same counter . . . " (R. 56-57).

G. W. West, the Manager of the department store, and a Kress employee for fifteen years[3] (R. 20) testified explicitly that exclusion of Negroes from the lunch counter and the closing of the counter when petitioners sought service; was caused by the City Ordinance requiring segregation in eating facilities (R. 25).

Confirmation that the police were enforcing segregation is indicated by the fact that some whites seated at the lunch counter during the demonstration remained seated and were not arrested (R. 34) although the announcement to leave was made in general terms (R. 19) and at least five policemen were present (R. 5, 6). Moreover, the counter was reopened as soon as petitioners were removed by the police (R. 25).

Further confirmation that the policy of enforcing segregation was the City's appears from how the arrests were made. The police proceeded to Department Store without requests to arrest by the management (R. 5), and arrested petitioners without a request from the management (R. 26). The manager of the store testified that arrest was entirely the decision of the police (R. 26) and it does not appear that the management signed any complaint against petitioners.

Prior to the demonstration, a representative of petitioers had discussed the question of service with the man-

[3] West came to live in Greenville on February 3, 1960, the day he became Manager of the Kress Store. Prior to this he worked for Kress in other Cities (R. 20, 21).

ager and had been told that the criminal process would not be invoked by the store (R. 43). This was not the first demonstration petitioners had held in Kress's (R. 44). When petitioners' counsel attempted to question the manager as to any agreement or arrangement he had made with the police prior to the closing of the lunch counter, the Court denied permission to proceed (R. 23, 24, 26).

On this record it is clear that Kress and Company would have been willing to cope with the controversy within the realm of social and economic give and take absent the Ordinance of the City of Greenville requiring segregation and the force of local customs supported by the City and the State of South Carolina.[4] If, as the manager testified, Kress & Company maintained the policy of segregation because of the Ordinance, then there can be no other conclusion than that the City, by the Ordinance and by arrest and criminal conviction, has "place[d] its authority behind discriminatory treatment based solely on color . . . " Mr.

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[4] There can be little doubt that segregation of the races had been and is the official policy of the State of South Carolina. Cf. S. C. A. & J. R. 1952 (47) 2223, A. & J. R. 1954 (48) 1695 repealing S. C. Const. Art. 11, §5 (1895) (which required legislature to maintain free public schools). S. C. Code §§21-761 to 779 (regular school attendance) repealed by A. & J. R. 1955 (49) 85; §21-2 (appropriations cut off to any school from which or to which any pupil transferred because of court order; §21-230(7) (local trustees may or may not operate schools); §21-238 (1957 Supp.) (school officials may sell or lease school property whenever they deem it expedient); S. C. Code §40-452 (1952) (unlawful for cotton textile manufacturer to permit different races to work together in same room, use same exits, bathrooms, etc., $100 penalty and/or imprisonment at hard labor up to 30 days; S. C. A. & J. R. 1956 No. 917 (closing park involved in desegregation suit); S. C. Code §§51-1, 2.1-2.4 (1957 Supp.) (providing for separate State Parks) §51-181 (separate recreational facilities in cities with population in excess of 60,000); §5-19 (separate entrances at circus); S. C. Code Ann. Tit. 58, §§714-720 (1952) (segregation in travel facilities).

Justice Frankfurter dissenting in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 727. The City Ordinance is no abstract exhortation but obligatory by its terms, to which were attached criminal sanctions, and it is uncontradicted that one of the reasons Kress & Company chose a policy of racial segregation was because of the Ordinance.

The discriminatory practice of Kress, the request that petitioners leave and their arrest and conviction, result, therefore, directly from the formally enacted policy of the City of Greenville, South Carolina, and not (so far as this record indicates) from any individual or corporate business decision or preference of the management of the store to exclude Negroes from the lunch counter. Whatever the choice of the property owner may have been, here the City made the choice to exclude petitioners from the property through its segregation Ordinance. This City segregation policy was enforced by petitioners' arrests, convictions and sentences in the South Carolina courts.

The Supreme Court of South Carolina dismisses reference to the City segregation Ordinance by stating "The Ordinance was made a part of the record upon request of defendants' counsel but defendants were not charged with having violated any of its provisions." But the Constitution forbids "sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson*, 307 U. S. 268, 275.[5]

By enacting, first, that persons who remain in a restaurant when the owner demands that they leave are "trespassers," and then enacting that restaurateurs may not

[5] Racial segregation imposed under another name often has been condemned by this Court. *Guinn* v. *U. S.*, 238 U. S. 347; *Lane* v. *Wilson*, *supra*; *Davis* v. *Schnell*, 81 F. Supp. 872 (S. D. Ala. 1949) aff'd 336 U. S. 933; and see *Louisiana State University and A. & M. College* v. *Ludley*, 252 F. 2d (5th Cir. 1958) cert. denied 358 U. S. 819.

permit Negroes to remain in white restaurants, South Carolina has very clearly made it a crime (a trespass) for a Negro to remain in a white restaurant. The manager of Kress's admits as much when he testified that the lunch counter was closed and petitioners asked to leave because of the Ordinance (R. 25).

This case thus presents a plain conflict with numerous prior decisions of this Court invalidating state efforts to require racial segregation. *Buchanan* v. *Warley*, 245 U. S. 60; *Brown* v. *Board of Education*, 347 U. S. 483; *Gayle* v. *Browder*, 352 U. S. 903 aff'g 142 F. Supp. 707, 712 (M. D. Ala. 1956); *Holmes* v. *City of Atlanta*, 350 U. S. 879; *Mayor and City Council of Baltimore* v. *Dawson*, 350 U. S. 877; *State Athletic Commission* v. *Dorsey*, 359 U. S. 533; cf. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715. Note the dissenting opinion of Judges Bazelon and Edgerton in *Williams* v. *Hot Shoppes, Inc.*, 293 F. 2d 835, 843 (D. C. Cir. 1961) (dealing primarily with the related issue of whether a proprietor excluding a Negro under an erroneous belief that this was required by state statute was liable for damages under the Civil Rights Act; the majority applied the equitable abstention doctrine). Indeed, *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845, 847 (4th Cir. 1959) relied upon by the Supreme Court of South Carolina below, indicated that racial segregation in a restaurant "in obedience to some positive provision of State law" would be a violation of the Fourteenth Amendment. See also *Boman* v. *Birmingham Transit Company*, 280 F. 2d 531 (5th Cir. 1960); *Baldwin* v. *Morgan*, 287 F. 2d 750 (5th Cir. 1961).

II.

The decision below conflicts with decisions of this Court securing the right of freedom of expression under the Fourteenth Amendment to the Constitution of the United States.

A. *The Enforcement of the State and City Segregation Policy and the Interference of the Police Violated Petitioners' Right to Freedom of Expression.*

Petitioners were engaged in the exercise of free expression, by verbal and nonverbal requests to the management for service, and nonverbal requests for nondiscriminatory lunch counter service, implicit in their continued remaining in the dining area when refused service. As Mr. Justice Harlan wrote in *Garner* v. *Louisiana*: "We would surely have to be blind not to recognize that petitioners were sitting at these counters, when they knew they would not be served, in order to demonstrate that their race was being segregated in dining facilities in this part of the country." 7 L. ed. 2d at 235-36. Petitioners' expression (asking for service) was entirely appropriate to the time and place at which it occurred. They did not shout or obstruct the conduct of business. There were no speeches, picket signs, handbills or other forms of expression in the store possibly inappropriate to the time and place. Rather they offered to purchase in a place and at a time set aside for such transactions. Their protest demonstration was a part of the "free trade in ideas" (*Abrams* v. *United States*, 250 U. S. 616, 630, Holmes, *J.*, dissenting), within the range of liberties protected by the Fourteenth Amendment, even though nonverbal. *Stromberg* v. *California*, 283 U. S. 359 (display of red flag); *Thornhill* v. *Alabama*, 310 U. S. 88 (picketing); *West Virginia State Board of Education* v.

Barnette, 319 U. S. 624, 633-634 (flag salute); *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449 (freedom of association).

Questions concerning freedom of expression are not resolved merely by reference to the fact that private property is involved. The Fourteenth Amendment right to free expression on private property takes contour from the circumstances, in part determined by the owner's privacy, his use and arrangement of his property. In *Breard* v. *Alexandria*, 341 U. S. 622, the Court balanced the "householder's desire for privacy and the publisher's right to distribute publications" in the particular manner involved, upholding a law limiting the publisher's right to solicit on a door-to-door basis. But cf. *Martin* v. *Struthers*, 319 U. S. 141 where different kinds of interests led to a corresponding difference in result. Moreover, the manner of assertion and the action of the State, through its officers, its customs and its creation of the property interest are to be taken into account.

In this constitutional context it is crucial, therefore, that the stores implicitly consented to the protest and did not seek intervention of the criminal law. For this case is like *Garner* v. *Louisiana*, *supra*, where Mr. Justice Harlan, concurring, found a protected area of free expression on private property on facts regarded as involving "the implied consent of the management" for the sit-in demonstrators to remain on the property. Petitioners informed the management that there would be a protest and received assurance that the management would not resort to the criminal process. Petitioners were not asked to leave the counter until the police arrived and the manager talked with the police. It does not appear that anyone connected with the store signed an affidavit or complaint against petitioners. The police officer proceeded immediately to

arrest the petitioners without any request to do so on the part of anyone connected with the store.

In such circumstances, petitioners' arrest must be seen as state interference in a dispute over segregation at this lunch counter, a dispute being resolved by persuasion and pressure in a context of economic and social struggle between contending private interests. The Court has ruled that judicial sanctions may not be interposed to discriminate against a party to such a conflict. *Thornhill* v. *Alabama, supra; San Diego Bldg. Trades Council* v. *Garmon*, 349 U. S. 236.

But even to the extent that the store may have acquiesced in the police action a determination of free expression rights still requires considering the totality of circumstances respecting the owner's use of the property and the specific interest which state judicial action supports. *Marsh* v. *Alabama*, 326 U. S. 501.

In *Marsh*, this Court reversed trespass convictions of Jehovah's Witnesses who went upon the privately owned streets of a company-town to proselytize, holding that the conviction violated the Fourteenth Amendment. In *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U. S. 793, the Court upheld a labor board ruling that lacking special circumstances employer regulations forbidding all union solicitation on company property constituted unfair labor practices. See *Thornhill* v. *Alabama, supra*, involving picketing on company-owned property; see also *N.L.R.B.* v. *American Pearl Button Co.*, 149 F. 2d 258 (8th Cir. 1945); *United Steelworkers* v. *N.L.R.B.*, 243 F. 2d 593, 598 (D. C. Cir. 1956), reversed on other grounds, 357 U. S. 357, and compare the cases mentioned above with *N.L.R.B.* v. *Fansteel Metal Corp.*, 306 U. S. 240, 252, condemning an employee seizure of a plant. In *People* v. *Barisi*, 193 Misc. 934, 86

N. Y. S. 2d 277, 279 (1948) the Court held that picketing within Pennsylvania Railroad Station was not a trespass; the owners opened it to the public and their property rights were "circumscribed by the constitutional rights of those who use it." See also *Freeman* v. *Retail Clerks Union*, Washington Superior Court, 45 Lab. Rel. Ref. Man. 2334 (1959); and *State of Maryland* v. *Williams*, Baltimore City Court, 44 Lab. Rel. Ref. Man. 2357, 2361 (1959).

In the circumstances of this case the only apparent state interest being subserved by these trespass prosecutions is support of the property owner's discrimination, a policy which the manager testified was caused by the State's segregation custom and policy and the express terms of the City Ordinance. This is the most that the property owner can be found to have sought.

Where free expression rights are involved, the question for decision is whether the relevant expressions are "in such circumstances and . . . of such a nature as to create a clear and present danger that will bring about the substantive evil" which the State has the right to prevent. *Schenck* v. *United States*, 249 U. S. 47, 62. The only "substantive evil" sought to be prevented by these trespass prosecutions is the stifling of protest against the elimination of racial discrimination, but this is not an "evil" within the State's power to suppress because the Fourteenth Amendment prohibits state support of racial discrimination. See *Cooper* v. *Aaron*, 358 U. S. 1; *Terminiello* v. *Chicago*, 337 U. S. 1; *Sellers* v. *Johnson*, 163 F. 2d 877 (8th Circuit, 1957), cert. denied 332 U. S. 851.

B. *The Convictions Deny Petitioners' Right to Freedom of Expression in That They Rest on a Statute Which Fails to Require Proof That Petitioners Were Requested to Leave by a Person Who Had Established Authority to Issue Such Request at the Time Given.*

In the courts below petitioners asserted that the statute in question denied due process of law secured by the Fourteenth Amendment to the Constitution of the United States in that it did not require that the person requesting them to leave the lunch counter establish his authority to make the demand. Although raised and pressed below by petitioners, the Supreme Court of South Carolina failed to construe the statute to require proof that the person who requested them to leave establish his authority.

If in the circumstances of this case free speech is to be curtailed, the least one has a right to expect is reasonable notice in the statute under which convictions are obtained, to that effect. *Winters* v. *New York*, 333 U. S. 507. Here, absent a statutory provision that the person making the request to leave be required to communicate that authority to the person asked to leave, petitioners, in effect, have been convicted of crime for refusing to cease their protests at the request of a person who could have been a stranger. The stifling effect of such a rule on free speech is obvious. See *Wieman* v. *Updegraff*, 344 U. S. 183; *Smith* v. *California*, 361 U. S. 147.

The vice of lack of fair notice was compounded where, as here, petitioners were convicted under a statute which designated two separate crimes, see *supra* p. 3, and a warrant which failed to specify under which section the prosecution proceeded (R. 2). Moreover, the warrant and the trial court stated that petitioners were charged with "trespass after warning" (R. 2). (Section (1) of the Statute speaks of being "warned"; Section (2) "without having been warned"), but the prosecution offered no proof that

petitioners had been "warned" within six months as required by Section (1) and apparently proceeded on the theory that Section (2) of the statute was involved.

This record is barren of any attempt by the City of Greenville to prove that the person who requested petitioners to leave identified his authority to do so to petitioners, and the courts of South Carolina, although urged by petitioners, failed to require such proof. While one of the petitioners brought out, when questioned by her own counsel, that she had spoken to the manager previously,[6] there is no evidence that the other petitioners knew the authority of the person who gave the order to leave. With rights to freedom of expression at stake, the City should be required to provide clear and unambiguous proof of all the elements of the crime. Identification of authority to make the request to leave is all the more important because of the active role played by the police in this case, for if the police were enforcing segregation clearly petitioners had a right to remain at the counter. *Garner* v. *Louisiana*, *supra*.

No one ordinarily may be expected to assume that one who tells him to leave a public place, into which the proprietor invited him and in which he has traded, is authorized to utter an order to leave when no claim of such authority is made. This is especially true in the case of a Negro seating himself in a white dining area in Greenville, South Carolina—obviously a matter of controversy and one which any stranger, or the police of a city with a segregation ordinance, might be expected to volunteer strong views. If the statute in question is interpreted to mean that one must leave a public place under penalty of being held a criminal when so ordered to do so by a person who later turns

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[6] She also testified that the police, not the manager, gave the order for petitioners to leave. See Note 1, *supra*.

out to have been in authority without a claim of authority at the time, it means as a practical matter, that one must depart from public places whenever told to do so by anyone; the alternative is to risk fine or imprisonment. Such a rule might be held a denial of due process. Cf. *Lambert* v. *California*, 335 U. S. 225. But if such is the rule the statute gives no fair warning. *Winters* v. *New York*, *supra*; *Burstyn* v. *Wilson*, 343 U. S. 495; *Saia* v. *New York*, 334 U. S. 558; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568. Absent such notice, petitioners surely were entitled to assume that one may go about a public place under necessity to observe orders only from those who claim with some definiteness the right to give them.

Indeed, as a matter of due process of law, if it is the rule one must obey all orders of strangers to leave public places under penalty of criminal conviction if one uttering the order later turns out to have had authority, petitioners are entitled to more warning of its harshness than the statute's text affirmed. Cf. *Connally* v. *General Construction Co.*, 269 U. S. 385; *Lanzetta* v. *New Jersey*, 306 U. S. 451. Otherwise many persons—like these petitioners—may be held guilty of crime without having intended to do wrong. This Court has said, however, that:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. Morrissette v. U. S., 342 U. S. 246, 250.

Morrissette, of course, involved a federal statute as treated in the federal courts. But it expresses the fundamental view that *scienter* ought generally to be an element in criminality. See Sayre, *Public Welfare Offenses*, 33 Columbia L. Rev.

55, 55-6 (1933). The pervasive character of *scienter* as an element of crime makes it clear that a general statute like the ordinance now in question, in failing to lay down a *scienter* requirement, gives no adequate warning of an absolute liability. Trespass statutes like the one at bar are quite different from "public welfare statutes" in which an absolute liability rule is not unusual. See *Morrissette v. United States, supra*, 342 U. S. at 252-260.

On the other hand, however, if South Carolina were to read a *scienter* provision into this ordinance for the first time—which it has failed to do although the issue was squarely presented in this case—the lack of the necessary element of guilt, notice of authority, would require reversal under authority of *Garner v. Louisiana, supra; Thompson v. City of Louisville*, 362 U. S. 199.

Wherefore, for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Order

IN THE

GREENVILLE COUNTY COURT

JAMES RICHARD PETERSON, ET AL.,

—v.—

CITY OF GREENVILLE.

APPEAL FROM THE RECORDER'S COURT
OF THE CITY OF GREENVILLE

This is an appeal to this Court from the Recorder's Court of the City of Greenville.

The Defendants were tried on August 11, 1960, in the Greenville City Recorder's Court before the Recorder, John V. Jester, upon a charge of violating the Act of May 20, 1960, which in substance makes any person a trespasser who refuses to leave the premises of another immediately upon being requested to leave.

The Act is very simple and plain in its language.

It appears that on August 9, 1960, the ten Defendants, who are making this appeal, with four other young Negro youths went to the store of S. H. Kress and Company and seated themselves at the lunch counter at the store. At the trial there seemed to be some attempt to minimize the evidence of the officers involved as to whether or not the Defendants, now Appellants, refused to leave the premises immediately upon the request of the store manager that

they should leave. However, in the argument of the chief counsel for the Appellants, all question of doubt in this respect is resolved in favor of the City. According to the written Brief of the Defendants, the Defendants now "seated themselves at the lunch counter where they sought to be served. They were not served and, in fact, were told by the management that they could not be served and would have to leave. The Defendants refused to leave and remained seated at the lunch counter."

The act clearly makes it a criminal offense for any person situated as the Defendants were to refuse or fail to "*immediately*" depart upon request or demand.

Therefore, the main question before this Court is whether or not the Appellants were lawfully tried on a charge of violating this Act by refusing to leave the lunch counter immedately when requested to do so.

In the oral argument counsel for the Appellants seemed to reply in a vague manner upon an "unconstitutional application" of the Statute.

As the Court views the statute it was merely a statutory enlargement and re-enactment of the common law in South Carolina which has been recognized for more than a half century to the effect that when a property owner, whether it be a dwelling house or place of business, has the right to order any person from the premises whether they be an invitee or an uninvited person. This principle of law was fully and clearly reaffirmed by the Supreme Court of South Carolina in the recent case of *State* v. *Starner, et al.*, 49 S. E. (2d) 209.

For scores of years South Carolina has had a number of Statutes with reference to the law of trespass. They are now embodied as Article 5, Code of 1952, embracing Sections 16-381 to 16-394. Section 17-286 particularly refers to trespasses after notice.

Therefore, the Act of May 20, 1960, now designated in the 1952 Code as Sec. 17-388 is the controlling factor here. There can be no doubt that the field into which the Legislature entered by the enactment of this particular law was a well recognized portion of the law of the State of South Carolina. The Constitutionality of the Act cannot be questioned.

Every presumption will be made in favor of the Constitutionality of a statute. There are more than fifty decisions by the Supreme Court of South Carolina to this effect. The United States Supreme Court in many cases has recognized that there is a presumption in favor of the constitutionality of an Act of Congress or of a State or Municipal legislative body. In the case of *Davis* v. *Department of Labor*, 317 U. S. 255, 87 Law Ed. 250, the United States Supreme Court held that there is a presumption of constitutionality in favor of State statutes. Time and time again the Supreme Court of South Carolina has held "the law is well settled that the burden is on the person claiming the Act to be unconstitutional to prove and show that it is unconstitutional beyond a reasonable doubt". *McCollum* v. *Snipes*, 49 S. E. 12, 213 S. C. 254.

In 16 C. J. S. 388, we find this language, "Statutes are presumed to be valid and a party attacking a statute as unconstitutional has the burden of proof". Over five hundred decisions from all over the United States are cited to support this statement of the law.

The argument of counsel for the Appellants failed to raise a single serious question as to the constitutionality of the statute.

Counsel for Appellants insisted upon the right of the Defendants to adduce evidence of some alleged conspiracy or plan on the part of the officers of the law and store

management to bring about this prosecution. We think the sole issue in the Recorder's Court was whether or not the Defendants were guilty of violating the Act in question. They now boldly admit through counsel that they defied the management of the store and refused to leave when requested. Had they departed from the store immediately, as the law requires they should have, there would have been no arrest, but apparently in accordance with a preconceived plan they all kept their seats and defied the management and refused to leave the premises.

Evidence of any other motive on the part of the management would have thrown no light on this case.

In my opinion the appeal should be dismissed because the prosecution was conducted under a valid constitutional statute and in addition the appeal should be dismissed upon the ground that S. H. Kress and Company had a right to control its own business. We think this position is fully sustained under the recent case of *William* v. *Johnson*, Res. 344, 268 Fed. (2d) 845, and the North Carolina case of *State* v. *Nelson*, decided January 20, 1961, and reported in 118 S. E. (2d) at page 47.

I carefully considered all the exceptions made by the Appellants and I am unable to sustain any of them. It is, therefore,

ORDERED, ADJUDGED AND DECREED that the Appeal be dismissed.

JAMES H. PRICE,
Special Judge,
Greenville County Court.

March 17, 1961.

Opinion

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CITY OF GREENVILLE,

Respondent,

—v.—

JAMES RICHARD PETERSON, YVONNE JOAN EDAY, HELEN ANGELA EVANS, DAVID RALPH STRAWDER, HAROLD JAMES FOWLER, FRANK G. SMITH, ROBERT CROCKETT, JAMES CARTER, DORIS DELORES WRIGHT and ROSE MARIE COLLINS,

Appellants.

Appeal From Greenville County

James H. Price, Special County Judge

Case No. 4761

Opinion No. 17845

Filed November 10, 1961

TAYLOR, *C.J.*: Defendants were convicted of the charge of trespass after notice in violation of Section 16-388, Code of Laws of South Carolina, 1952, as amended, and appeal. By agreement of counsel, all bail bonds were continued in effect pending disposition of this appeal.

On August 9, 1960, in response to a call, law enforcement officers were dispatched to the S. H. Kress Store in Greenville, South Carolina, a member of a large chain of

stores operated throughout the United States and described as a junior department store. Upon arrival they found the ten defendants and four others who were under sixteen years of age, all Negroes, seated at the lunch counter. There is testimony to the effect that because of the local custom to serve white persons only at the lunch counter the manager of the store announced that the lunch counter was closed, the lights were extinguished, and all persons were requested to leave. The white persons present left, but all Negroes refused to leave; and those above the age of sixteen were thereupon charged with trespass after notice as provided in the aforementioned section of the Code, which provides:

> "Any person:
>
> "(1) Who without legal cause or good excuse enters into the dwelling house, place of business or on the premises of another person, after having been warned within six months preceding, not to do so or
>
> "(2) Who, having entered into the dwelling house, place of business or on the premises of another person without having been warned within six months not to do so, and fails and refuses, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, or his agent or representative,
>
> "Shall, on conviction, be fined not more than one hundred dollars or be imprisoned for not more than thirty days."

Defendants contend, first, error in refusing to dismiss the warrant upon the ground that the charge contained therein was too indefinite and uncertain as to apprise the

defendants as to what they were actually being charged with.

Defendants were arrested in the act of committing the offense charged, they refused the manager's request to leave after the lunch counter had been closed and the lights extinguished, and there could have been no question in defendants' minds as to what they were charged with. Further, there was at that time no claim of lack of sufficient information, and upon trial there was no motion to require the prosecution to make the charge more definite and certain. Defendants rely upon State v. Randolph, et al., —— S. C. ——, 121 S. E. (2d) 349, where this Court held that it was error to refuse defendants' motion to make the charge more definite and certain in a warrant charging breach of the peace. It was pointed out in that case that breach of the peace embraces a variety of conduct and defendants were entitled to be given such information as would enable them to understand the nature of the offense. This is not true in instant case where the charges were definite, clear and unambiguous; further, no motion was made to require the prosecution to make the charge more definite and certain. There is no merit in this contention.

Defendants next contend that their arrest and conviction was in furtherance of a custom of racial segregation in violation of the Fourteenth Amendment to the Constitution of the United States.

Defendants entered the place of business of the S. H. Kress Store and seated themselves at the lunch counter, they contend, for the purpose of being served, although four of them had no money and there is no testimony that such service was to be paid for by others.

The testimony reveals that the lunch counter was closed because it was the custom of the S. H. Kress Store in

Greenville, South Carolina, to serve whites only and after all persons had left or been removed the lunch counter was reopened for business. The statute with no reference to segregation of the races applies to "Any person: * * * Who fails and refuses without cause or good excuse * * * to leave immediately upon being ordered or requested to do so by the person in possession or his agent or representative, * * * " The act makes no reference to race or color and is clearly for the purpose of protecting the rights of the owners or those in control of private property. Irrespective of the reason for closing the counter, the evidence is conclusive that defendants were arrested because they chose to remain upon the premises after being requested to leave by the manager.

Defendants do not attack the statute as being unconstitutional but contend that their constitutional rights were abridged in its application in that they were invitees and had been refused service because of their race. The cases cited do not support this contention while there are a number of cases holding to the contrary. See Hall v. Commonwealth, 188 Va. 72, 49 S. E. (2d) 369, 335 U. S. 875, 69 S. Ct. 240, 93 L. Ed. 418; Henderson v. Trailway Bus Company, D. C. Va., 194 F. Supp. 423; State v. Clyburn, 247 N. C. 455, 101 S. E. (2d) 295; State v. Avent, 253 N. C. 580, 118 S. E. (2d) 47; Williams v. Howard Johnson Restaurant, 4 Cir., 268 F. (2d) 845; Slack v. Atlantic White Tower System, Inc., D. C. Md., 181 F. Supp. 124, 4 Cir., 284 F. (2d) 746; Griffin v. Collins, D. C. Md., 187 F. Supp. 149; Wilmington Parking Authority v. Burton, Del., 157 A. (2d) 894; Randolph v. Commonwealth, —— Va. ——, 119 S. E. (2d) 817. The Fourteenth Amendment erects no shield against merely private conduct, however discriminatory or wrongful, Shelley v. Kraemer, 334 U. S. 1,

68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. (2d) 441; and the operator of a privately owned business may accept some customers and reject others on purely personal grounds in the absence of a statute to the contrary, Alpaugh v. Wolverton, 184 Va. 943, 136 S. E. (2d) 906. In the absence of a statute forbidding discrimination based on race or color, the operator of a privately owned place of business has the right to select the clientele he will serve irrespective of color, State v. Avent, 253 N. C. 580, 118 S. E. (2d) 47. Although the general public has an implied license to enter any retail store the proprietor or his agent is at liberty to revoke this license at any time and to eject such individual if he refuses to leave when requested to do so, Annotation 9 A. L. R. 379; Annotation 33 A. L. R. 421; Brookshide Pratt Mining Co. v. Booth, 211 Ala. 268, 100 So. 240, 33 A. L. R. 417; and may lawfully forbid any and all persons, regardless of reason, race or religion, to enter or remain upon any part of his premises which are not devoted to public use, Henderson v. Trailway Bus Company, 194 F. Supp. 426.

The lunch counter was closed, the lights extinguished, and all persons requested to quit the premises. Defendants refused and their constitutional rights were not violated when they were arrested for trespass.

Upon cross-examination of Capt. G. O. Bramlette of the Greenville City Police Department, it was brought out that the City of Greenville has an ordinance making it unlawful for any person owning, managing, or controlling any hotel, restaurant, cafe, etc., to furnish meals to white persons and colored person except under certain conditions; and Defendants contend that they were prosecuted under this ordinance; however, the warrant does not so charge and there is nothing in the record to substantiate

this contention. The ordinance was made a part of the record upon request of defendants' counsel but defendants were not charged with having violated any of its provisions. The question of the validity of this ordinance was not before the trial Court and therefore not before this Court on appeal.

Defendants further contention that the prosecution failed to establish the corpus delicti is disposed of by what has already been said.

We are of opinion that the judgment and sentences appealed from should be affirmed; and IT IS SO ORDERED. AFFIRMED.

OXNER, LEGGE, Moss and LEWIS, *JJ.*, concur.

Certificate

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Case No. 6032

CITY OF GREENVILLE,

Respondent,

—against—

JAMES RICHARD PETERSON, YVONNE JOAN EDDY, HELEN ANGELA EVANS, DAVID RALPH STRAWDER, HAROLD JAMES FOWLER, FRANK G. SMITH, ROBERT CROCKETT, JAMES CARTER, DORIS DELORES WRIGHT and ROSE MARIE COLLINS,

Appellants.

I, Harold R. Boulware, hereby certify that I am a practicing attorney of this Court and am in no way connected with the within case. I further certify that I am familiar with the record of this case and have read the opinion of this Court which was filed November 10, 1961, and in my opinion there is merit in the Petition for Rehearing.

/s/ HAROLD R. BOULWARE

The Court neither overlooked nor misapprehended any of the facts set forth herein. Therefore the Petition is denied.

/s/ C. A. TAYLOR, *C.J.*

/s/ G. DEWEY OXNER, *A.J.*

/s/ LIONEL K. LEGGE, A.J.

/s/ JOSEPH R. MOSS, *A.J.*

/s/ J. WOODROW LEWIS, *A.J.*

Columbia, South Carolina
November 16, 1961.